Supreme Court, U.S.
FILED
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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LEO LUTHER DAVIS

Petitioner,

versus

STATE OF MISSISSIPPI

Respondent,

---

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE
STATE OF MISSISSIPPI

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE MISSISSIPPI SUPREME COURT WHEN IT FAILS TO ENSURE THAT ALL LITIGANTS, CIVIL OR CRIMINAL, ARE AFFORDED THE SAME STANDARDS OF REVIEW AND QUALIFICATIONS FOR EXPERT WITNESS TESTIMONY IN ALL MATTERS WHICH INVOLVE THE SAME OR SIMILAR FACT QUESTIONS.

## REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

The denial of the Petitioner's Petition for Writ of Certiorari sought to be reviewed was entered in the Mississippi Supreme Court and entitled:

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2002-CT-01738-SCT

LEO LUTHER DAVIS
v.
STATE OF MISSISSIPPI

The denial of the Petition for Certiorari by the Mississippi Supreme Court is in the Appendix at A-1.

The Petitioner's Petition for Writ of Certiorari was submitted in response to the opinion issued by the Mississippi Court of Appeals on the 30th day of March, 2004, and entitled:

IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI
NO. 2002-KA-01738-COA

LEO LUTHER DAVIS
v.
STATE OF MISSISSIPPI

The opinion of the Mississippi Court of Appeals is in the Appendix at A-2.

## JURISDICTION

The judgment for which review is sought was entered signed on July 22, 2004, and file stamped by the clerk of court on July 29, 2004. (A-1) The judgment for which review is sought is a final judgment of the Supreme Court of Mississippi where review could be sought from a judgment entered by the Court of Appeals for the State of Mississippi and the Circuit Court of Harrison County, Mississippi, and where the judgment turns upon substantial federal questions. Jurisdiction of the United States Supreme Court is pursuant to 28 United States Code, Section 1257.

The federal questions involved arise out of the summary dismissal by the Supreme Court of Mississippi of the Petitioner's Petition for Writ of Certiorari to that court questioning the equal application of the laws of the State of Mississippi to all litigants before that court as opposed to the appearance of its "selective" application of those same laws, in the same or similar context, to the review of matter involving other litigants, and a denial of due process and equal protection under the law in violation of the Fourteenth Amendment to the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSISSIPPI CONSTITUTION, ART.3, §14

No person shall be deprived of life, liberty, or property except by due process of law.

## STATEMENT OF THE CASE

On August 15, 2002, the Petitioner was convicted of two counts of sexual battery. As part of its case-in-chief, the State of Mississippi tendered Dr. Donald J. Matherne as an expert witness in the field of clinical psychologist.

Prior to the testimony of Dr. Matherne the Petitioner objected to any and all testimony by this witness regarding his "fist technique" and his demonstration of that technique to the jury. The trial court overruled the motion and found that Dr. Matherne would simply be testifying as to a method of gathering information and not about a scientific test or principle. Further, over the Petitioner's continued objection the trial court ruled that Dr. Matherne could use his "fist" demonstration.

During the course of his testimony, Dr. Matherne was questioned as to the technique he used with alleged sexual abuse victims dealing with the degree of penetration. He went on to describe how he would have the child make a fist with their right hand. He would tell them to imagine that it was their private parts. Then he would instruct them to take their other hand and show what happened. Dr. Matherne stated that he used this to determine if there was penetration as opposed to superficial contact. He further stated that this information is vital in the examination process because DHS[1] wants to know if a physical examination would be advantageous. Dr. Matherne further testified that the "importance ... of this information[2] is that medical examination may not always indicate trauma to the

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[1]Department of Human Services for the State of Mississippi.

[2]From the "fist" demonstration.

interior of the vaginal area.... It also helps to explain why medical examination in some instances does not show evidence of trauma...."

At the time of Petitioner's trial the State of Mississippi utilized the *Frye*[3] test as the basis for determining the qualification of expert witnesses. However, subsequent to Petitioner's trial and during the appeal process of his conviction, the State of Mississippi adopted the modified *Daubert*[4] standard as the standard for the qualification of expert witnesses. The modified *Daubert* standard was adopted in the case of *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss.2003).

Petitioner's appeal was assigned to the Court of Appeals for the State of Mississippi. In its opinion affirming the Petitioner's conviction, the Court of Appeals referenced the *McLemore* case, but affirmed that the testimony was not scientific, but merely information gathering in nature.

The Petitioner has consistently argued that the "fist technique" utilized by Dr. Matherne in forming his opinion is "expert testimony" which must comply with the Rule 702 of the Mississippi Rules of Evidence, either as the rule existed at the time of Petitioner's trial (*Frye* standard) or following its amendment on May 29, 2003 (modified *Daubert* standard).

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[3] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

## ARGUMENT

IS FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, VIOLATED BY THE MISSISSIPPI SUPREME COURT WHEN IT FAILS TO ENSURE THAT ALL LITIGANTS, CIVIL OR CRIMINAL, ARE AFFORDED THE SAME STANDARDS OF REVIEW AND QUALIFICATIONS FOR EXPERT WITNESS TESTIMONY IN ALL MATTERS WHICH INVOLVE THE SAME OR SIMILAR FACT QUESTIONS.

With few exceptions, the Mississippi Rules of Evidence mirror the federal rules of evidence. Prior to the Mississippi Supreme Court's decision in *McLemore*[5] (A-15), the State of Mississippi had steadfastly utilized the *Frye*[6] standard for the qualification of expert testimony even though *Daubert*[7] had been the prevailing standard for the admission of such testimony in other courts for some time. With its issuance of the *McLemore* opinion the Mississippi Supreme Court made an about-face and adopted the *Daubert* standard as modified by *Kumho Tire*[8].

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[5] *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss.2003)

[6] *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

[7] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

[8] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)

The adoption of the modified *Daubert* standard occurred prior to the affirmation of the Petitioner's conviction by the Mississippi Court of Appeals (A-2), but after, the Petitioner's conviction in the lower court. In affirming the Petitioner's conviction the Mississippi Court of Appeals referenced the Mississippi Supreme Court's opinion in *McLemore*. However, the Court of Appeals found that the testimony in question by the State's expert witness was not scientific, but merely "information gathering".

In *McLemore* the Mississippi Supreme Court discussed the testimony of the expert witness in that case at great length, going so far as to compare the testimony in question under both the standard as it existed under *Frye*, and, pursuant to the modified *Daubert* standard. Although that Court reversed and remanded due to the failure of the testimony to comply with the modified *Daubert* standard, the Court also determined that the testimony in question would also not qualify under the *Frye* standard.

The shortcomings found by the Mississippi Supreme Court in the expert testimony presented in *McLemore* substantially, if not completely, mirror the expert testimony presented in Petitioner's criminal trial in the lower court by the State's expert witness, Dr. Matherne, concerning the application of, and his conclusions derived from said application of, his "fist technique."

DUE PROCESS AND EQUAL PROTECTION

The Mississippi Court of Appeals is duty bound to follow the established precedent of the Mississippi Supreme Court. *Bosarge v. State*, 786 So.2d 426,431 (¶11) (Miss.App.2001); *Rains v. Gardner*, 731 So.2d 1192,1196 (¶14)

(Miss.1999) Further, "[it] is a general rule that judicially enunciated rules of law are applied retroactively." *Thompson v. City of Vicksburg*, 813 So.2d 717,721 (¶16) (Miss.2002); *Jackson v. City of Wiggins*, 760 So.2d 694,696 (¶5) (Miss.2000); *Ales v. Ales*, 650 So.2d 482,484 (Miss.1995)

Notwithstanding these two clearly established lines of cases by the Mississippi Supreme Court, the Mississippi Court of Appeals failed to follow the precedent established in the *McLemore* case in its decision to affirm the Petitioner's conviction, although it did reference *McLemore*.

Even though the Mississippi Court of Appeals failed to follow established precedent of the Mississippi Supreme Court, the Petitioner still had an avenue of redress with his ability to file a Petition for Writ of Certiorari with the Mississippi Supreme Court. However, that Court summarily denied the Petitioner's Petition.

Petitioner was denied the due process and equal protection of the law provided to him by both the Fourteenth Amendment to the United States Constitution and Article 3, Sec. 14 of the Mississippi Constitution when the Mississippi Supreme Court refused to review his case in light of the Mississippi Court of Appeals' failure to follow established precedent; and especially that precedent set forth by the Mississippi Supreme Court in *McLemore*.

The question of how and why such a denial of due process and equal protection could occur is seen in the following quote by a Justice of the Mississippi Supreme Court found in two different opinions issued by that Court for matters on review:

> We also acknowledge that our decisions in many cases are 'fact-driven' thereby meaning that, even in applying a 'harmless error analysis', had the facts in this case been different, the result here certainly could have been different.

*Kolberg v. State*, 829 So. 29,50-1 (¶40) (Miss.2002); See, *Rush v. Wallace Rentals, LLC*, 837 So.2d 191,199-200 (¶25) (Miss.2003)

Notwithstanding that the Mississippi Supreme Court may not have liked the facts presented in the Petitioner's criminal trial, Petitioner was entitled to have his case reviewed, and the established precedents applied, in the same manner as other appellants before that same Court.

## CONCLUSION

The Petitioner, Leo Luther Davis, has been deprived of a right which has been extended to other persons similarly situated as he. The Court should grant this petition and after due consideration set aside the summary dismissal of the Petitioner's Petition for Writ of Certiorari by the Mississippi Supreme Court with directions on how the Court should afford due process and equal protection to the Petitioner, and to all citizens similarly situated as the Petitioner.

RESPECTFULLY SUBMITTED, this the _____ day of October, 2004.

Serial: 115609

IN THE SUPREME COURT OF MISSISSIPPI

No. 2002-CT-01738-SCT

FILED
JUL 29 2004

LEO LUTHER DAVIS

v.

STATE OF MISSISSIPPI

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ORDER

This matter came before the Court on the petition for writ of certiorari filed by Davis. After due consideration, the Court finds that the petition should be denied.

IT IS THEREFORE ORDERED that the petition for writ of certiorari is hereby denied.

SO ORDERED, this the 22nd day of July, 2004.

s/James W. Smith, Jr.
JAMES W. SMITH, JR.,

CHIEF JUSTICE

FOR THE COURT

TO DENY: SMITH, C.J., WALLER AND COBB, P.J.J., EASLEY, CARLSON, GRAVES, DICKINSON AND RANDOLPH, J.J.

NOT PARTICIPATING: DIAZ, J.

IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

NO. 2002-KA-01738-COA

LEO LUTHER DAVIS — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

| | |
|---|---|
| DATE OF TRIAL COURT JUDGMENT: | 8/15/2002 |
| TRIAL JUDGE: | HON. ROBERT H. WALKER |
| COURT FROM WHICH APPEALED: | HARRISON COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | KAY L. WILKERSON |
| ATTORNEY FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: SCOTT STUART |
| DISTRICT ATTORNEY: | CONO A. CARANNA, II |
| NATURE OF THE CASE: | CRIMINAL - FELONY |
| TRIAL COURT DISPOSITION: | CONVICTION OF TWO COUNTS OF SEXUAL BATTERY, SENTENCED TO SERVE A TERM OF 25 YEARS ON EACH COUNT WITH SENTENCES TO RUN CONCURRENTLY IN THE CUSTODY OF THE MDOC |

DISPOSITION: AFFIRMED - 3/30/2004

MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

Leo Luther Davis was convicted by a jury of the Circuit Court of Harrison County of two counts of sexual battery and sentenced to serve two terms of twenty-five years, running concurrently, in the Mississippi Department of Corrections. Feeling aggrieved by this judgment, Davis appeals and asserts the following issues: (1) whether the trial court erred when it allowed Dr. Matherne to testify about his "fist" technique, (2) whether the trial court erred when it found that the tender years exception was applicable and allowed Lori Ehlers to testify as to statements made by the victim as an exception to the hearsay rule under M.R.E. 803(25, (3) whether the trial court erred when it allowed the testimony of Dr. Matherne as an exception to the hearsay rule under M.R.E. 803(4), (4) whether the trial court erred in not granting his motion for a directed verdict or peremptory instruction, and (5) whether the trial court erred in not granting his motion for new trial.

Ascertaining no error, we affirm.

## FACTS

On December 3, 2000, Davis went to the Biloxi home of his deceased best friend, George Stille, who had died on December 2, 2000. After George's death, the home was occupied by Reiko Stille, George's mother; Sabrina Stille, George's wife; and his three children. One of George's children was a nine-year-old girl named A.H.

Davis, George's wife, and others were celebrating New Year's Eve. A.H. was in bed in her bedroom that evening. Davis came into A.H.'s bedroom, felt her forehead, cheeks, neck, and chest. He then left A.H.'s room but returned shortly thereafter. He pulled down A.H.'s bed covers, pulled up her shirt, and pulled down her panties. He touched A.H.'s vagina, inserted his finger into it, and told her that she was beautiful. He then withdrew his finger and began licking her vagina. After a couple of minutes, he got up and walked back into the television room. A.H. got up, went to the restroom, and washed herself.

On June 18, 2001, a Harrison County grand jury indicted Davis on two counts of sexual battery against a child under the age of fourteen years. On March 5, 2002, a three-day trial began which ended in a mistrial after jurors were unable to reach a unanimous verdict. A second trial was conducted on August 14-15, 2002, where Davis was convicted of both counts and sentenced to two terms of twenty-five years to run concurrently. Davis soon after filed a motion for a new trial which was denied by the trial court. Other pertinent facts will be related during the discussion of the issues.

## ANALYSIS AND DISCUSSION OF THE ISSUES

### 1. Admission of Dr. Matherne's Expert Testimony

Admission or exclusion of expert testimony is controlled by the trial judge's discretion, and an appellate court will not disturb that decision unless the trial court clearly abused that discretion. *Sheffield v. Goodwin*, 740 So.2d 854,856 (¶16) (Miss.1999). However, the discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. *Johnston v. State*, 567 So.2d 237,238 (Miss.1990).

Since this issue, as well as issue three, concerns Dr. Matherne's testimony, we combine the two issues for discussion. First, Davis argues that the trial court abused its discretion when it allowed Dr. Matherne, a clinical psychologist, to testify regarding a "fist technique" which he employs young children, who are suspected of having been sexually abused, to use to help demonstrate what occurred during the incidents of sexual abuse. According to Davis, this testimony went beyond the necessary information gathering for medical treatment. He argues that this "fist technique" is scientific evidence and, as such, subject to the admissibility requirements of *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)

The State asserts that Dr. Matherne's description of the "fist technique" was only used in his effort to discover how deeply AH. was penetrated. However, the State contends that Dr. Matherne's testimony concerning the "fist technique" was more accurately a lay opnion and admissible under Rule 701 of the Mississippi Rules of Evidence. In its assessment of the expert testimony offered by Dr. Matherne, the trial court found that he would be testifying to the "fist technique" as a method of information gathering.

We do not find *Frye* applicable in the resolution of the issue. The Frye standard deals with the qualification criteria for allowing one to testify as an expert witness. *See Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31 (Miss.2003). Here Davis, does not complain about Dr. Matherne's qualifications as an expert witness; rather, he asserts, without explaining, that the "fist technique" which in reality is nothing more than a hand demonstration, is scientific evidence which must be filtered through the criterial for expert testimony.

We agree with the trial court that the "fist technique" referred to by Dr. Matherne was only a form of information gathering. In his testimony, Dr. Matherne testified that the "fist technique" is a demonstration in which he asks a child to make a fist with one hand, to assume that the fist represents her private area, and to use a finger of the other hand to demonstrate what type of contact was made to her private area. He explained that he uses this procedure to assist in making a determination as to whether a physical examination of the child will be of any benefit. He testified that it was important to know whether digital penetration occurred, and, if so, how deeply. He further explained that if the penetration was slight, a physical examination would not necessarily detect any trauma. We find nothing improper with the trial judge's decision to allow this testimony. This issue is without merit.

Secondly, Davis argues that the circuit court erred in allowed Dr. Matherne to testify to statements made to him by A.H. Davis explains that the totality of the information obtained by Dr. Matherne from A.H. was very limited and not the type which a reasonable physician would rely upon. Davis further argues that Dr. Matherne did not conduct a physical examination of A.H.

The trial court allowed Dr. Matherne to testify to statement that A.H. made to him during a psychological evaluation that he conducted on the child. The court allowed the testimony pursuant to Rule 803(4) of the Mississippi Rules Evidence which provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule "if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness." M.R.E. 803(4). Before admitting evidence pursuant to M.R.E. 80394), a two part

test must be met: "the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and ... the content of the statement must be such as is reasonably relied on by a physician in treatment." *Doe v. Doe*, 644 So.2d 1199, 1205-06 (Miss.1994)

We find that the trial court did not err in admitting Dr. Matherne's testimony pursuant to Rule 803(4). Dr. Matherne testified that he conducted a one-on-one psychological evaluation of A.H. in his office on February 5, 2001. He explained that he asked A.H. a series of non-leading questions to determine whether she had been the victim of any child abuse. Dr. Matherne testified that, during the evaluation, A. H. told him that Leo touched her on or around her vaginal area and licked her in the same area.

Statements made by a child sexual abuse victim concerning the acts of sexual abuse, along with the identify of the perpetrator, are reasonably pertinent to treatment and are reasonably relied upon by physicians in diagnosis and treatment." *See Id.* at 1206. Here Dr. Matherne's testimony concerned matters consistent with the purposes of promoting treatment of A.H. Moreover, the content of A.H.'s statement is the type of information that is reasonably relied upon by a physician in treatment. We therefore find no merit in Davis's arguments.

2. Testimony pursuant to the Tender Years Exception

Davis next argues that the trial court was in error when it determined that A.H. was a child of "tender years" and that the statement which she gave to Lori Ehlers, her school counselor, had substantial indicia of reliability. According to Davis, he sufficiently rebutted the presumption, without opposition from

the State, that A.H. was a child of tender years. He further asserts that the statement made by A.H. to Lori Ehlers was contradicted by A.H.'s statement to Dr. Matherne and by the testimony of A.H. herself. He therefore concludes that Ehler's hearsay statement was not admissible.

The State rebuts that Amanda was nine years of when she made the statement to Lori Ehlers; therefore, there was a presumption that she was of tender years. The State concludes that the trial court applied the correct legal standard and did not abuse its discretion.

Rule 803(25) of the Mississippi Rules of Evidence states:

> Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness; provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Our supreme court has ruled that here is a rebuttable presumption that a child under the age of twelve is of tender years. *Veasley v. State*, 735 So.2d 432,436 (¶16) (Miss.1999). The relevant time to determine whether the tender years exception to the hearsay rule applies is the age of the child at the time the relevant statement was made rather than the age of the

child at the time that testimony is given at trial. *Marshall v. State*, 812 So.2d 1068,1075 (¶20) (Miss.App.Ct.2001); *McGowan v. State*, 742 So.2d 1183,1186 (¶17) (Miss.App.Ct.1999)

The evidence demonstrates that A.H. was nine years old when she made the statement to Ehlers concerning her sexual abuse. Therefore, there existed a rebuttable presumption that A.H. as a child of tender years. Although Davis acknowledges that the trial court determined A.H. was competent to testify and was "very bright and articulate," Davis fails to demonstrate how he has rebutted the tender years exception.

Secondly, in his argument that A.H.'s statement to Ehlers lacked a substantial indicia of reliability, Davis misinterprets "reliability." Instead of pertaining to the statement's contraction to other evidence, which will ultimately be considered by the fact finder, the reliability of the statement is determined by the surrounding circumstances in which the statement was given. Some of these factors have ben listed in the comment to Rule 803(25).

Ehlers explained that she held a private counseling session with A.H. on January 30, 2001. She testified that A.H. shared with her an incident that A.H. experienced around Christmas in 2000. Ehlers testified that Ehlers believed that she was the first person that A.H. had told about the incident. Ehlers affirmed that she never suggested to A.H. what information to relate.

We find that the circuit court did not err in its admission of Ehlers's testimony concerning statements made to her by A.H. We see nothing in the record which suggests that Davis presented sufficient evidence to rebut the presumption that A.H.

was of tender years. The fact that A.H. may have given contradictory testimony does not in the least prove that A.H. was not of tender years at the time the incidents occurred. Further, we find nothing in the record which suggests that A.H.'s statements to Ehlers were made under circumstances warranting a finding that they lacked substantial indicia of reliability. Therefore, we do not find that the circuit erred in finding that A.H.'s statement to Ehlers possessed a substantial indicia of reliability. We reject as meritless Davis's contention on this issue.

3. Sufficiency of the Evidence

Davis argues that the trial court was in error when it denied his motions for a directed verdict and his request for a peremptory instruction, as insufficient evidence existed upon which reasonable jurors could have returned a guilty verdict as to either charge of sexual battery. The State counters that the evidence was sufficient to support each element of the two charges of sexual battery.

In *Jefferson v. State*, 818 So.2d 1099,1110 11 (Miss.2002), our supreme court held that the standard of review for denials of motions for a directed verdict, judgment notwithstanding the verdict and a request for peremptory instruction is the same. Each of these motions challenges the legal sufficiency of the evidence presented at trial. *Id.* "Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion that the challenge was made in the trial court. *McClain v. State*, 625 So.2d 774,778 (Miss.1993) (citing *Wetz v. State*, 503 So.2d 803,807 08 (Miss.1987)

A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of fourteen years of age if the person is twenty-four months older than the child. Miss. Code Ann. §97-3-95 (Rev.2000). "Sexual penetration" includes cunnilingus, fellation, buggery or pederasty, as well as, any penetration of the genital or anal openings of another person's body by any part of a person's body. Miss. Code Ann. §97-3-97 (Rev.2000).

A.H. testified that Davis came into her bedroom and felt her forehead, cheek, neck and chest. She explained that he left the room and soon after returned. A.H. further testified that Davis pulled down her panties, started touching her private with his fingers, and thereafter, pushed his finger inside of her. She explained that after a couple of minutes, Davis began to lick her on he vagina.

Ehlers, A.H.'s school counselor, testified that she conducted a counseling session with A.H. after receiving a referral from a school nurse. Ehlers explained that, during a discussion with A.H. about conversations A.H. was having with A.H.'s sister, A.H. asked her about sex. Ehlers testified that A.H. told her that, shortly before or around Christmas time in December 2000, Davis came into her bedroom, rubbed her forehead, pulled down her pants, and licked her private parts.

Dr. Matherne testified that, during his psychological evaluation of A.H. on February 5, 2001, she shared that Davis had touched her in a uncomfortable way. According to Matherne, AH. stated that Davis came in her bedroom in December 2000, touched her forehead, took off her panties, touched her on or around her vaginal area, and licked her on her private parts. Dr. Matherne also testified that he showed A.H. an anatomical drawing and asked her to show him where she had

been touched. He explained that she marked the vaginal area in the drawing. Finally, Dr. Matherne testified that he asked A.H. to demonstrate with her index finger and fist how Davis touched her. He stated that A.H. penetrated her fist with the index finger of her other hand and rubbed it around in her fist. He stated that, based on A.H.'s demonstration, it was his opinion that there had been penetration of the vagina, but that there would be no physical evidence of damage done to the hymen because of the slight depth of the penetration.

Davis concedes that "the unsupported word of the victim of a sex crime is sufficient to support a guilty verdict where the testimony is not discredited or contradicted by other credible evidence, especially if the conduct of the victim is consistent with the conduct of one who has been victimized by a sex crime." *Cross v. State*, 759 So.2d 354,356 (¶11) (Miss.1999). Here, we have not only the testimony of A.H. to prove Davis's guilty but the testimony of both Ehlers and Matherne who corroborated A.H.'s testimony. Consequently, we find the evidence more than sufficient to support Davis's conviction of the two counts of sexual battery.

The fact that the testimony of A.H., Ehlers, and Dr. Matherne may have differed in some respects does not mean that the State's evidence was deficient, for in a criminal prosecution, it is the jury's function, after hearing all the evidence and receiving the applicable law and instructions, to accept the testimony of some witnesses and reject that of others, as well as to accept in part and reject in part the evidence on behalf of the state or on behalf of the accused. *Gathright v. State*, 380 So.2d 1275,1278 (Miss.1980). In other words, the credibility of witnesses is not for the reviewing court. *Id.* Based on the evidence presented, we are satisfied that the jury, after sorting through the evidence, was justified in returning the verdict it did.

We are therefore not at liberty to disturb its verdict, for reasonable and fair-minded persons could certainly find Davis guilty on this evidence.

4. New Trial

Davis finally argues that the trial court committed error when it denied his motion for a new trial. The State rebuts that its evidence supported the verdict and that the verdict was not against the overwhelming weight of the evidence.

A motion for new trial challenges the weight of the evidence and implicates the discretion of the trial court in denying the motion. A reversal is warranted only if the trial court abused its discretion in denying the motion. *Edwards v. State*, 800 So.2d 454,464-65 (¶25) (Miss.2001) (citing *Sheffield v. State*, 749 So.2d 123,127 (¶16) (Miss.1999)). "[An appellate court] accepts as true the evidence which supports the verdict and gives the benefit of all favorable inferences that may be drawn from the evidence to the prosecution." *Jefferson* 818 So.2d at 1112 (¶34) (Miss.2002) (citing *Edwards*, 800 So.2d at 465). The appellate court will not order a new trial "unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an 'unconscionable injustice.'" *McDowell v. State*, 813 So.2d 694,699-700 (¶20) (Miss.2002).

Considering the evidence previously described in this opinion, we are not persuaded that the verdict is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. Consequently, we affirm the trial judge's denial of Davis's motion for a new trial.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF TWO COUNTS OF SEXUAL BATTERY AND SENTENCE OF TWENTY-FIVE YEARS ON EACH IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH THE SENTENCES TO RUN CONCURRENTLY, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

McMILLIN, C.J., KING AND SOUTHWICK, P.J.J., BRIDGES, THOMAS, LEE, MYERS, CHANDLER AND GRIFFIS, J.J., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2001-CA-01039-SCT

MISSISSIPPI TRANSPORTATION COMMISSION

V.

DENNIS McLEMORE AND TAMMY McLEMORE

| | |
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| DATE OF JUDGMENT: | 3/28/2001 |
| TRIAL JUDGE: | HON. MILLS E. BARBEE |
| COURT FROM WHICH APPEALED: | DESOTO COUNTY SPECIAL COURT OF EMINENT DOMAIN |
| ATTORNEYS FOR APPELLANT: | RICHARD G. NOBLE<br>HOLLAMAN MARTIN RANEY<br>OFFICE OF THE ATTORNEY GENERAL<br>BY: BILLY DON HALL |
| ATTORNEY FOR APPELLEES: | TAYLOR D. BUNTIN |
| NATURE OF THE CASE: | EMINENT DOMAIN |
| DISPOSITION: | REVERSED AND REMANDED - 10/16/2003 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

EN BANC.

This eminent domain case arises from the Special Court of Eminent domain of DeSoto County, where a jury awarded

Dennis and Tammy McLemore total compensation and damages in the amount of $1,370,000. Because the testimony of Rip Walker, the McLemores' expert appraisal witness, fails to satisfy the *Frye* standard or the modified *Daubert* standard for the admissibility of expert witness testimony, the trial court erred in denying MTC's motion in limine and in admitting Walker's testimony. The judgment of the trial court is therefore reversed, and this case is remanded for a new trial, consistent with this opinion.

## FACTS

The McLemores owned 1,980 acres of land in DeSoto County, Mississippi. Responding to increased growth in Desoto County and development in Tunica County, the Mississippi Transportation Commission ("MTC") planned to construct an interstate highway between U.S. Interstate 55 at Hernando and U.S. Highway 61 at Robinsonville. The proposed interstate crosses the McLemores' DeSoto County Property. Because it was unable to obtain the required 174-acre portion of the McLemores' DeSoto County property ("McLemore property") through negotiations, the MTC instituted this eminent domain action.

Seeking to condemn the McLemore property for use in the proposed project, the MTC on November 30, 1999, filed a complaint for the organization of a Special Court of Eminent Domain in DeSoto County. After a trial, the jury returned a verdict in favor of the McLemores, and the trial court entered judgment on the verdict. The MTC subsequently filed a motion for judgment notwithstanding the verdict, remittitur, or a new trial, which the trial court denied. The MTC raises the following issues in this appeal:

I. WHETHER THE TRIAL COURT ERRED AS A MATER OF LAW IN FAILING TO APPLY THE *FRYE* STANDARD TO EXCLUDE THE UNRELIABLE TESTIMONY OF RIP WALKER, THE McLEMORES' EXPERT APPRIASAL WITNESS, WHEN THE COURT DENIED MTC'S MOTION IN LIMINE AND DENIED MTC'S MOTION FOR NEW TRIAL AND/OR REMITTITUR.

II. WHETHER THE JURY VERDICT WAS THE RESULT OF THE TRIAL COURT'S ERROR IN ADMITTING SPECULATIVE AND TOTALLY UNRELIABLE DAMAGE TESTIMONY BY THE McLEMORES' APPRAISAL WITNESS.

III. WHETHER THIS COURT WILL ABANDON THE *FRYE* STANDARD AND ENDORSE AND ADOPT THE *DAUBERT/KUMHO* STANDARDS SO THAT A TRIAL JUDGE CAN ENSURE THAT ALL EXPERT TESTIMONY AND EVIDENCE IS NOT ONLY RELEVANT, BUT RELIABLE.

STANDARD OF REVIEW

Our well-settled standard of review for the admission or suppression of evidence is abuse of discretion. *Haggerty v. Foster*, 838 So.2d 948,958 (Miss.2002). Moreover, a motion in limine should be granted only if "(1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." *Whittley v. City of Meridian*, 530 So.2d 1341,1344 (Miss.1988). Furthermore, the admission of expert testimony is withing the sound discretion of the trial judge. *Puckett v. State*,

737 So.2d 322,342 (Miss.1999). Therefore, the decision of a trial judge will stand "unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion."

## DISCUSSION

The MTC argues that we should abandon the general acceptance test set forth in *Frye v. United States*, 293 F.1013,1014 (D.C.Cir.1923), for determining the admissibility of expert witness testimony in favor of the rule stated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as modified in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct.1167, 143 L.Ed.2d 238 (1999). We agree. Walker's testimony failed to satisfy either the *Frye* standard or the modified *Daubert* standard; therefore, his testimony should have been excluded.

### I. ADOPTION OF THE DAUBERT/KUMHO TIRE RULE AS THE STANDARD FOR ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

The analysis for admission of expert testimony is enumerated in the Mississippi Rules of Evidence, Rule 702, as amended on May 29, 2003. The amended rule states that:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon*

> *sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

M.R.E. 702 (emphasis added). Rule 702, as amended, is identical to Rule 702 of the Federal Rules of Evidence.

Under Rule 702, expert testimony should be admitted only if it withstands a two-pronged inquiry. *Kansas City S. Ry. v. Johnson*, 798 So.2d 374,382 9Miss.2001). First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. *Id.* (citing M.R.E. 702). Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. *Id.* In addition, Rule 702 "does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge." M.R.E. 702 cmt.

Prior to its amendment earlier this year, the comment to M.R.E. 702 quoted the well-known Frye test, noting that Rule 702 did not "relax the requirement that the scientific principle from which the expert's opinion is derived 'must be sufficiently established to have gained general acceptance in the particular field to which it belongs." M.R.E. 702 cmt. (repealed 2003) (quoting *Frye*, 293 F. at 1014). Our previous cases recognize this Court's long adherence to the *Frye* rule despite the adoption of M.R.E. 702 and major changes in federal evidence law. *See, e.g., Kansas City*, 798 So.2d at 382 (citing *Gleeton v. State*, 716 1083,1087 (Miss.1998)). In deciding whether the field has gained "general acceptance," we have previously asked:

> Is the field of expertise one in which it has been

> scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion? Where the answer to this question is in the affirmative, we generally will allow expert testimony.

*House v. State*, 445 So.2d 815,822 (Miss.1984).

Further, we have stated that "[t]he facts upon which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture." *Hickox v. Holleman*, 502 So.2d 626,638 (Miss.1987) (quoting *Kruszewski v. Holz*, 265 Md. 434, 290 A.2d 534,540 (1972)). However, we have made clear that under the *Frye* standard, "it is not necessary that one offering to testify as an expert be infallible or possess the highest degree of skill; it is sufficient if that person possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by a layman." *Kansas City*, 798 So.2d at 382 (quoting *Hooten v. State*, 492 So.2d 948 (Miss.1986)).

In 1993, the United States Supreme Court declared that the Federal Rules of Evidence supersede the *Frye* general acceptance test. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579,587, 113 S.Ct. 2786, 125 L.Ed.2d 479 (1993). Despite this major change in federal evidence law, Mississippi has continued to apply *Frye*. *See Kansas City*, 798 So.2d at 382.

In *Daubert*, the Court concluded that the "general acceptance" test is inconsistent with other evidentiary provisions that strive to prevent the admission of unreliable or irrelevant scientific testimony. *Daubert*, 509 U.S. at 589. The rigidity of the "general acceptance" test also conflicts with the liberal goals

of the Federal Rules which include reducing the traditional barriers to opinion testimony. *Id.* at 588-89 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153,169, 109 S.Ct. 439,450, 102 L.Ed.2d 445 (1988)).

However, the Court determined that a federal trial court retains authority to review scientific evidence to determine admissibility. *Id.* at 589. The trial court is vested with a "gatekeeping responsibility." *Id.* The trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." Id. at 592-93. Preliminary questions of witness qualifications, privileges and admissibility of evidence are resolved pursuant to Rule 104(a) and 1049b). *Id.* at 592. The trial judge determines whether the testimony rests on a reliable foundation and is relevant in a particular case. *Id.* at 592. There must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592. The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation. *Id.* at 590.

*Moreover, the Court in Daubert determined that abandoning the general acceptance test does not result in jury confusion from "absurd and irrational pseudoscientific assertions," since "[v]igorous cross examination, presentations of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Id. at 595-96 (citing Rock v. Arkansas, 438 U.S. 44,62, 107 S.Ct. 2704,2714, 97 L.Ed.2d 37 (1987)). If evidence is deemed insufficient for a reasonable juror to conclude that the position is more likely than not true,*

*the trial court can direct a judgment or grant summary judgment. Id. at 596 (citing Fed. R. Civ. P. 50(a), 56). These well-established, traditional devices provide better safeguards than full exclusion of testimony which meets the standards of Rule 702.* Id.

The Court in *Daubert* adopted a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony. *Id.* at 592-94. The focus of this analysis "must be solely on principles and methodology, not on the conclusions they generate." *Id.* at 595. These factors include whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and, whether the theory or technique enjoys general acceptance within a relevant scientific community. Id. at 592-94. The applicability of these factors depends on the nature of the issue, the expert's particular expertise, and the subject of the testimony. *Kumho Tire*, 526 U.S. at 151. The *Daubert* Court emphasized that the reliability inquire contemplated by Rule 702 "is a flexible one." *Daubert*, 509 U.S. at 594. In *Kumho Tire*, the Court illustrated such flexibility in that:

> It might not be surprising that in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may not have ever interest any scientist. Nor, on the other, and does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example,

> do theories grounded in any so-called generally accepted principles of astrology or necromancy.

*Kumo Tire*, 526 U.S. at 151.

Therefore, the Court determined that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Id.* at 150. Thus the trial court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152. That is, the *Daubert* factors should be considered "where they are reasonable measures of the reliability of expert testimony." *Id.* Furthermore, neither *Daubert* nor the Federal Rules of Evidence requires that a court "admit opinion evidence that is connected to existing data only by the *ispe dixit* of the expert," as self-proclaimed accuracy by an expert an insufficient measure of reliability. *Id.* at 157 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136,146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

The Court's holding in *Daubert* was specifically limited to scientific expert testimony since the testimony at issue in that case was "scientific" in nature. *Kumho Tire*, 526 U.S. at 147. However, the Court in *Kumho Tire* concluded that a trial court's basic "gatekeeping responsibility" applies to the admissibility of expert testimony based on "technical" and "other specialized" knowledge. *Id.* Analyzing the language of Rule 702, the Court concluded that the word "knowledge" and not the words that modify it "establishes a standard of evidentiary reliability." *Id.* at 148 (quoting *Daubert*, 509 U.S. 589-90).

In addition, the Court in *Kumho Tire* noted that the evidentiary rationale that supports trial courts' gatekeeping responsibilities is not limited to scientific knowledge. *Id.* When stating opinions, an expert is given greater latitude than a lay witness under the assumption that an expert's opinion is reliably based on knowledge and experience particular to a chosen discipline. *Id.* However, whether testimony is based on professional studies or personal experience, the "gatekeeper" must be certain that the expert exercises the same level of "intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

Thus, to summarize, the analytical framework provided by the modified *Daubert* standard requires the trial court to perform a two-pronged inquiry in determining whether expert testimony is admissible under Rule 702. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239,244 (5thCir.2002). The modified *Daubert* rule is not limited to scientific expert testimony - rather, the rule applies equally to all types of expert testimony. *Kumho Tire*, 526 U.S. at 147. First, the court must determine that the expert testimony is relevant - that is, the requirement that the testimony must "assist the trier of fact' means the evidence must be relevant." *Mathis v. Exxon Corp.*, 302 F.3d 448,460 (5thCir.2002) (citing Fed.R.Evid.702). Next, the trial court must determine whether the proffered testimony is reliable. *Pipitone*, 288 F.2d at 244. Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the *Daubert* analysis is a flexible one. *Id.* *Daubert* provides "an illustrative, but not an exhaustive, list of factors" that trial courts may use in assessing the reliability of expert testimony. *Id.*

In applying the modified *Daubert* rule, Mississippi's federal courts have recognized that the gatekeeping role of

federal trial courts is taken seriously. *Hammond v. Coleman Co.*, 61 F.Supp.2d 533,537 (S.D.Miss.1999), *aff'd mem.* 209 F.3d 718 (5thCir.2000). Moreover, there is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony. 61 F.Supp.2d at 537.

*Daubert/Kumho Tire* analysis has been used to exclude a medical doctor's testimony on cause of fybromyalgia. *Black v. Food Lion, Inc.*, 171 F.3d 308 (5thCir.1999). Because of the many types of experts and expertise, the application of *Daubert* is fact specific and appropriately uses relevant factors to determine reliability. *Id.* at 311.

After eliminating other possible causes, the expert in *Black* concluded that a fall at Food Lion was the cause of the patient's fibromyalgia. *Id.* at 314. This conclusion was based on an improper exercise in scientific logic and the unacceptable fallacy of post-hoc propter-hoc reasoning. *Id.* A scientifically reliable conclusion on causation was not possible since the doctor did not know the exact process or factors triggering the disease. *Id.* A conclusion for which there was no underlying medical support was not vindicated by the use of general methodology in the medical field. *Id.* A "standard of meaningless high generality rather than boring in on the precise state of scientific knowledge in this case" could not render a proper determination. *Id.*

The Fifth Circuit has applied *Daubert* to expert testimony in an eminent domain proceeding. *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Mississippi*, 80 F.3d 1074 (5thCir.1996). The district court refused to admit expert testimony of Rip Walker and Rogers Varner regarding severance damages resulting from an exercise of eminent domain. The opinions were deemed

"speculative and not based on reliable foundations" providing "no aid to the finder of fact in determining just compensation in this case." *Id.* at 1076 (citing 884 F.Supp. 224,227 (N.D.Miss.1995)). The experts expressed uncertainty about the extent of flooding on the property in the event of heavy rainfall resulting in the district court's decision that the burden to demonstrate a diminution in the value of the landowner's property was not met. *Id.* at 1077. This application of the reliability test was overly stringent. *Id.*

The trial court's role as gatekeeper is not intended as a replacement for the adversary system. *Id.* The admission of expert assessment of value must be cautiously determined because of the expert's critical role in the valuation of the strong interest of both property owners and governments in just compensations. *Id.* at 1077. Absent other grounds to exclude, an expert's testimony is presumptively admissible when relevant and reliable. *Id.* Not entirely speculative, nor unreliable, the experts' testimony was not inadmissible because of their inability to predict the extent of flooding. *Id.* at 1079.

This Court has consistently refused to apply the reasoning of *Daubert* and its progeny in evaluating the admissibility of expert witness testimony under the previous version of M.R.E. 702. *Kansas City*, 798 So.2d 382 (citing *Gleeton v. State*, 716 So.2d 1083,1087 (Miss.1998); *Crawford v. State*, 716 So.2d 1028,1046 (Miss.1998); *Polk v. State*, 612 So.2d 381,390 (Miss.1992)). While we concluded in *Humphrey v. State*, 759 So.2d 368,384 (Miss.2000), that the *Frye* standard of general acceptance is "time proven," M.R.E. 702 was amended earlier this year, and the comment to the current rule states:

[T]he Supreme Court clearly recognizes the gate

> keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed.R.Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is important to note...that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination: *Daubert's* "list of factors was meant to be helpful, not definitive." *Kumho*, 526 U.S. at 151.

M.R.E. 702 cmt. Notably, the comment makes no mention of *Frye* or the general acceptance test. Thus, the current version of Rule 702 recognizes that the *Daubert* rule, as modified, provides a superior analytical framework for evaluating the admissibility of expert witness testimony.

Considering this Court's recent May 29, 2003, adoption of the revised Rule 702 with the additional language found in the federal rule, this Court today adopts the federal standards and applies our amended Rule 702 for assessing the reliability and admissibility of expert testimony. This standard recognizes the distinction between lay and expert witnesses. Like the Federal Rules, our rules grant wide latitude for experts to give opinions even when the opinions are not based on the expert's firsthand knowledge or observations. With a focus on relevance and reliability, this approach is superior to the "general acceptance" test in *Frye*, because the *Frye* test can result in the exclusion of relevant evidence or the admission of unreliable evidence.

The gatekeeping function of the trial court is consistent with the underlying goals of relevancy and reliability in the

Rules. *Daubert* ensures that the relevancy requirements of the rules are properly considered in an admissibility decision. Rule 702 gives the judge "discretionary authority, reviewable for abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire*, 526 U.S. at 158.

We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony. The modified *Daubert* test does not require trial judges to become scientists or experts. Every expert discipline has a body of knowledge and research to aid the court in establishing criteria which indicate reliability. The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field. Every substantive decision requires immersion in the subject matter of the case. The modified *Daubert* test will not change the role of the trial judge nor will it alter the ever existing demand that the judge understand the subjects of the case, both in terms of claims and defenses. We are certain that the trial judges possess the capacity to undertake this review.

## II. ADMISSIBILITY OF RIP WALKER'S APPRAISAL TESTIMONY

The central issue of this appeal concerns a component of Walker's appraisal, referred to at trial as the 750-foot line of damage method ("750 foot line method"). Because it completely fails to satisfy the modified *Daubert* rule, we conclude that Walker's testimony was inadmissible. In addition, we also find that Walker's testimony fails to satisfy the requirements of the abandoned *Frye* rule.

## A. APPLICATION OF THE MODIFIED *DAUBERT* STANDARD

First, the Mississippi Rules of Evidence define relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. If the proffered evidence has any probative value at all, Rule 401 favors its admission. *Holladay v. Hollday*, 776 So.2d 662,676 (Miss.2000). That is, "the threshold for admissibility of relevant evidence is not great. Evidence is relevant if it has any tendency to prove a consequential fact." *Whitten v. Cox*, 799 So.2d 1,15 (Miss.2000). Walker's testimony regarding damages and the methods he used in determining damages was clearly relevant in this eminent domain action. Therefore, Walker's testimony satisfies the first prong of the modified *Daubert* standard.

Second, in our following reliability analysis we do not intend to set forth a generic checklist of factors that our state courts shall use in every instance where parties present expert witness testimony. Rather, we choose to follow the lead of the federal courts, using the illustrative *Daubert* factors for guidance and leaving the determination of which reliability factors are applicable in particular cases to the sound discretion of our learned trial judges. As our cases instruct, we review a trial judge's decision to admit expert witness testimony for abuse of discretion. *See Puckett v. State*, 737 So.2d at 342. Because the application of the modified *Daubert* rule is fact-specific, a review of Walker's trial testimony is necessary for our analysis. Walker used the 750-foot line method to determine the "after value" of a portion of the McLemores' property. Walker reasoned that the McLemore property abutting the proposed interstate right-of-way would be most affected by the proposed

construction. Thus, Walker concluded that "there is a certain amount of [the McLemore] land ... that would be less desirable and consequently have less value than it did before." Based on this reasoning, Walker projected an imaginary area, "kind of a buffer between the interstate right of way and where the new construction would be, ... that would be less desirable" after construction of the interstate.

In determining the boundary of the so-called buffer zone, Walker concluded that there is a certain distance from the right-of-way at which the proposed construction no longer has an adverse effect on the property's desirability. According to Walker, this point is at "a distance of ... between five hundred and a thousand feet" from the proposed interstate right-of-way. Arbitrarily splitting the difference, Walker concluded that the McLemore property within 750 feet of the proposed interstate would be more adversely affected than the rest of the property. According to his subsequent calculations, Walker determined that the buffer zone area consisted of 317 acres. Consequently, under Walker's theory, these 317 acres suffered more damages than the rest of the McLemore property.

Prior to trial, the MTC submitted a motion in limine requesting that the trial court exclude Walker's anticipated testimony regarding the 750-foot line method. the trial judge denied MTC's motion, reasoning that "[w]e are in ... a new era of eminent domain ... and ... if there are experts who testify with some basis their opinions are to be weighed by the jury as is the credibility of their testimony." During the course of the trial, the MTC repeatedly objected to Walker's testimony regarding his 750-foot line method.

After describing to the jury his 750-foot line method and the results obtained from his calculations, Walker gave the

following curious testimony regarding his appraisal method:

Q: Mr. Walker, is the method that you have performed this appraisal, is it according to generally accepted appraisals standards and you understand them?

A: Well, I think, I think that we have got some issues here with what those standards are. And my opinion is that we have got a situation that is fairly rare and new, especially - just eminent domain itself is new. But this is what I consider breaking new ground in that there is a situation here where I think there is no question that the after value is affected by this highway. And in determining how much you want to try to use accepted standards and methodology that has been in the past, but when this is the maybe the first time that something like this has happened or at least the first time it has happened this particular way, there is problem with using methods that have been used in the past, because they just not there.

In addition, Walker testified to the following facts on cross-examination: (1) the method he employed in his appraisal is, to his knowledge, not printed in any textbook; (2) the method is not taught in seminars; (3) the 750 foot line method is unique to the McLemore appraisal; (4) the 750-foot line method is not "a principle of any kind"; and (5) the 750-foot line method was not taught in any of the courses Walker completed to obtain his appraiser's licenses in Mississippi, Tennessee, and Arkansas.

Unlike his expert testimony in United States v. 14.38 Acres of Land, Walker's testimony in this case is entirely speculative. None of the illustrative factors approved by the United States Supreme Court in *Daubert* and *Kumho Tire* weigh

in favor of allowing Walker's testimony here. Therefore, it is clear that Walker's testimony was inadmissible and should have been excluded.

First, it is apparent that Walker's 750-foot line method has not been used in the appraisal field since Walker himself testified that his appraisal method was unique to the McLemore appraisal. Moreover, it is clear that Walker's theory cannot be tested. Under the theory, there is some portion of the McLemore property that will be more adversely affected by the construction than the rest of the property. This portion abuts the proposed interstate and extends a distance of distance 500 and 1000 feet onto the McLemore property. Walker concluded that this most affected portion of the property terminates at a distance of 750 feet from the interstate right-of-way. This theory cannot be tested since the location of the imaginary boundary line is not based on any principle. Walker merely split the difference between 500 and 1000 feet. In other words, Walker could have chosen to locate the line at 813 feet of 698 feet instead of 750 feet. This theory is clearly not capable of being tested since Walker simply chose the 750-foot offset at random.

Second, there is no evidence that Walker's theory has been the subject of any peer review. It is also evident from the record that the theory has not been the subject of any publication. Walker himself testified that the theory is not printed in textbooks or taught in courses and seminars.

Third, there is a high potential rate of error associated with Walker's theory. Again, the key to Walker's theory is the placement of the imaginary buffer zone boundary line. There is no evidence that the location of this line is based on anything more than Walker's speculation. Thus, there is a very real and high potential for error associated with the 750-foot line method.

Fourth, there is no evidence of standards that control the operation of Walker's 750-foot line method. As discussed, supra, Walker arbitrarily chose to use 750 feet as the offset instead of another random distance. In essence, Walker's speculation alone determines the location of the buffer zone boundary line; therefore, it is clear that there are, in fact, no standards that control this method.

Finally, Walker himself testified the method was unique to the McLemore appraisal. If this method is peculiar to a single appraisal, that the appraisal community has not adopted this method. Therefore, it is clear that this theory is not generally accepted in the appraisal field.

Walker's testimony was inadmissible under the modified Daubert standard since it wholly fails to comport with the non-exhaustive, illustrative list of factors set out in Daubert and Kumho Tire. The trial court therefore clearly erred in admitting Walker's testimony. Because we reverse and remand this case for a new trial, we need not consider MTC's second assignment of error.

B. APPLICATION OF THE ABANDONED *FRYE* STANDARD.

Although we expressly reject the *Frye* standard today, it should be noted that Walker's testimony was inadmissible even under the abandoned *Frye* rule. As we interpreted it, *Frye* stood for the proposition that expert testimony would be allowed only if it was based on a principle that was generally accepted in the particular field in question. Obviously, a theory or method is not generally accepted when it is unique to a particular situation, not taught or discussed in courses or textbooks, "breaks new ground," and is not used by other practitioners in that particular

field. It is clear that Walker's testimony was inadmissible even under the abandoned *Frye* test. Therefore, even under the rule we abandon today, Walker's testimony should have been excluded.

## CONCLUSION

We conclude that Rip Walker's expert testimony regarding the "750-foot line method" was entirely speculative, failing to satisfy either the "*Frye* test" or our newly adopted "modified *Daubert* test," as set out in this Court's May 29, 2003, amendment to Rule 702, thus such testimony was inadmissible. Accordingly, we reverse the trial court's judgment and remand this case to the trial court for a new trial consistent with this opinion.

REVERSED AND REMANDED.

PITTMAN, C.J., WALLER AND COBB, J.J., CONCUR. McRAE, P.J., EASLEY AND GRAVES, J.J., DISSENT WITHOUT SEPARATE WRITTEN OPINION. DIAZ AND CARLSON, J.J., NOT PARTICIPATING.